

AI AI Captain: Divergent Jurisdictional Approaches to Artificial Intelligence Regulatory & Policy Development

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8 November, 2023

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About The Author



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Chelsea has been with the Global Regulatory Compliance Team since 2019. She holds a BCL in Civil Law and an MSc International Public Policy & Diplomacy from University College Cork. She has extensive experience in both the public and private sector, overseeing and managing regulatory developments in a number of areas such as artificial intelligence and ecolabeling.

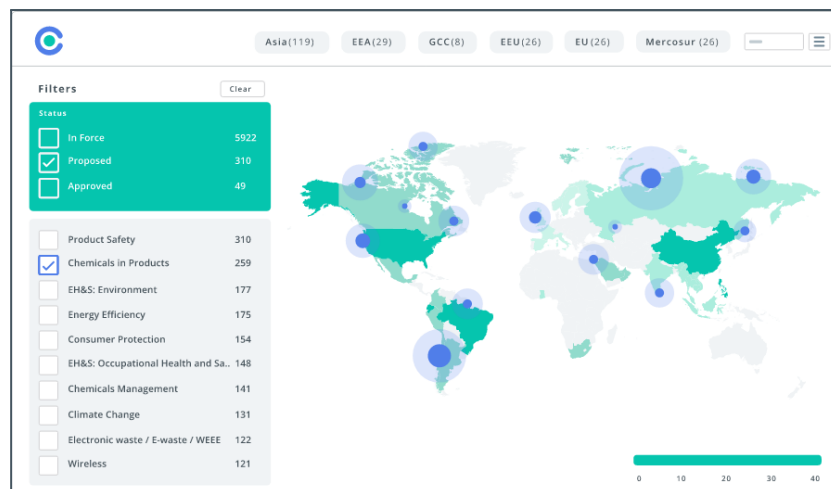
Chelsea is based in London and heads up Compliance & Risks' Knowledge Partner Network, a select network of world-class law firms, leading engineering & environmental consultancies, industry experts and supply chain specialists delivering expert insights on product compliance. Chelsea consults both internally and externally on a number of regulatory areas and is currently an external researcher at the Center for AI and Digital Policy (CAIDP).

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1. Introduction

“Omne trium perfectum” or more commonly known as “good things come in threes” is a phrase that no doubt was on the minds of those in the AI sphere as the world ramped up for the highly-anticipated UK AI Safety Summit¹. We saw:

- The G7 introduce a voluntary AI code of conduct²;
- The US release an Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence³; and
- The EU AI Act is said to be in “touching distance⁴” of the passing of the first set of laws regulating AI.

Interestingly, while this global audience welcomes developments in fostering the AI regulatory sphere, one cannot but note the diverging trends throughout global jurisdictions and their approaches to regulating artificial intelligence.

We see the EU proposing landmark stringent enforcement actions, while the US is making fleeting reference to the idea of no enforcement action at all. The EU heavily emphasizes the creation of a new centralized body, while the UK takes a completely opposite approach - placing its trust in empowering existing regulators. China regulates strategically in an attempt to foster AI technology in a way that allows it to maximize the state's ability to harness its use as an important economic and geopolitical tool.

This whitepaper gives a high level overview of what’s happening on the global stage in the US, UK & China in relation to AI. The proposed EU AI Act is not included as it was discussed in my previous publication [“Rules for the Future - Regulating Artificial Intelligence in Europe”](#).

¹ <https://www.gov.uk/government/publications/ai-safety-summit-introduction>

² https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5379

³ <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/#:~:text=With%20this%20Executive%20Order%2C%20the%20information%20with%20the%20U.S.%20government>

⁴ <https://www.theguardian.com/technology/2023/oct/24/eu-touching-distance-world-first-law-regulating-artificial-intelligence-dragos-tudorache>

2. USA

On 31 October 2023, the Biden administration issued a landmark Executive Order (EO) to ensure that America leads the way in seizing the promise and managing the risks of artificial intelligence⁵. The EO aims to set out an era of new standards for AI Safety and Security with a focus on protecting the privacy of American citizens, ensuring the protection of groups such as consumers, students, and workers, while balancing the interests of promoting innovation and competition in the economy. The EO goes on to promise to ensure responsible and effective government use of AI while advancing American leadership abroad.

Under the EO, developers of the “most powerful AI systems⁶” will be required to share their test results and other critical safety information with the US government. These models are defined as any foundation model that poses a serious risk to national security, economic security, public health and/or safety⁷. Manufacturers of these models will be required to share any red-team safety results with the federal government - as well as notifying them of any training they may do. To support this, The National Institute of Standards and Technology will set the rigorous standards for extensive red-team testing to ensure safety before public release and these standards and their application shall be assessed in relation to critical infrastructure sectors as well as support the establishment of the National AI Safety and Security Board.

The EO sets out to prevent AI-enabled fraud and deception by establishing standards and best practices for detecting AI-generated content and authenticating official content. It is expected that guidance for content authentication will be published at a later date as well as the introduction of a watermark for labeling AI generated content. The administration also notes the need for a more stringent cybersecurity program to

⁵<https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/#:~:text=With%20this%20Executive%20Order%2C%20the%20information%20with%20the%20U.S.%20government>

⁶<https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/> at Section 10

⁷<https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/#:~:text=With%20this%20Executive%20Order%2C%20the%20information%20with%20the%20U.S.%20government>

be developed in tandem to support the development of these regulations, standards and frameworks.

The President has made a call on Congress to pass bi-partisan comprehensive data privacy legislation and has said the administration will evaluate how federal agencies will collect and use potentially sensitive commercial information they may collect. This all builds on the existing landscape in the US of a regulatory framework largely based on voluntary management frameworks such as the NIST AI Risk Management Framework⁸ and a reliance on an approach to industry led self regulation. There's also been movement in the area of regulating unlawful discrimination with the FTC proposal to ensure that algorithmic decision-making does not result in unlawful discrimination⁹, which the Biden EO also addresses in more detail for consumers, individuals engaging with the potential use of AI, in healthcare inter alia.

On 1 November 2023, Office of Management and Budget (OMB) released an implementation guidance following President Biden's Executive Order on Artificial Intelligence¹⁰. They are seeking comments in relation to "strengthening AI governance, advancing AI innovation in a responsible way and managing the risk from the use of AI by directing agencies to adopt mandatory safeguards for the development and use of AI that impacts the rights and safety of the public" [here](#)¹¹.

2.1. What Could Happen Next?

It is my opinion that given the pro-innovative approach the US has taken thus far to regulating AI at a federal level compared to the more stringent approach we see in the EU, that we will see a more state-led response to legislating the area going forward - reminiscent of California's California Consumer Privacy Act (CCPA)¹² a state level response to the EU General Data Protection Regulation (GDPR)¹³. This potentially

⁸ <https://www.nist.gov/itl/ai-risk-management-framework>

⁹ <https://www.reginfo.gov/public/do/eAgendaViewRule?publd=202110&RIN=3084-AB69>

¹⁰ <https://www.whitehouse.gov/omb/briefing-room/2023/11/01/omb-releases-implementation-guidance-following-president-bidens-executive-order-on-artificial-intelligence/>

¹¹ <https://ai.gov/input/>

¹² <https://oag.ca.gov/privacy/ccpa#:~:text=The%20California%20Consumer%20Privacy%20Act,how%20to%20implement%20the%20law.>

¹³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679>

makes things difficult for businesses that operate over state lines as it increases the regulatory burden requiring increased compliance.

3. United Kingdom

Following on from the publication of the AI Regulation Policy Paper¹⁴ in July 2022 which was the initial basis for proposing to regulate artificial intelligence in the UK, the UK Government published its AI whitepaper¹⁵ in March 2023 which outlines a bold approach aiming to pioneer the use of AI and its regulation in the United Kingdom. The July 2022 policy paper outlined a *“regulatory framework that is proportionate, light-touch and forward-looking is essential to keep pace with the speed of developments in these technologies”*¹⁶ and was based on the five OECD AI Principles¹⁷ which was developed to protect human rights and democratic value balancing an approach that was both innovative and trustworthy at its core.

The UK also moved away from the proposed EU AI Act¹⁸, hailed as potentially setting the international standard for legislating in this area, by diverging on the basis of not introducing a definition for what classifies as “AI” or an “AI system” but instead aiming to allow for scope for individual regulators to take a “deliberately agile and iterative approach”¹⁹ to systems that may fall in their remit. This may be welcomed by businesses as it will allow them to potentially take a more pragmatic and proportionate approach to managing their business expectations in relation to AI, described by the UK Government as avoiding “creating cumbersome rules applying to all AI technologies, our framework ensures that regulatory measures are proportionate to context and outcomes, by focusing on the use of AI rather than the technology itself.”²⁰

¹⁴<https://www.gov.uk/government/publications/establishing-a-pro-innovation-approach-to-regulating-ai/establishing-a-pro-innovation-approach-to-regulating-ai-policy-statement>

¹⁵<https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach/white-paper>

¹⁶<https://www.gov.uk/government/publications/establishing-a-pro-innovation-approach-to-regulating-ai/establishing-a-pro-innovation-approach-to-regulating-ai-policy-statement>

¹⁷<https://oecd.ai/en/ai-principles>

¹⁸<https://www.europarl.europa.eu/news/en/press-room/20230609IPR96212/meps-ready-to-negotiate-first-ever-rules-for-safe-and-transparent-ai>

¹⁹<https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach/white-paper> at pp.9

²⁰<https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach/white-paper> at pp.6

It is important to note however that the publication of this paper “**does not** alter the current territorial arrangement of AI policy in the UK or the extraterritorial application of existing legislation in the AI sphere.”²¹

The proposed framework is underpinned by 5 principles to guide and inform the responsible development and use of AI in all sectors of the economy:

- Safety, security and robustness;
- Appropriate transparency and explainability;
- Fairness;
- Accountability and governance;
- Contestability and redress²².

The five principles upon which the framework is built, as mentioned above, will be principles on a statutory footing initially. The government believes that introducing onerous legislative requirements on businesses would potentially stifle AI innovation and instead have proposed that the principles will be issued on a non-statutory basis and implemented by existing regulators. This means that businesses will have to closely engage with regulators that may issue guidance in relation to their sector. Examples of this can already be seen i.e the MHRA (Medicines and Healthcare products Regulatory Agency) published a roadmap clarifying in guidance the requirements for AI and software used in the medical devices sector²³. An expected AI Regulation Roadmap is expected in the first 6 months following the publication of the framework whereby it is hoped more clarity on the aforementioned as well as central functions will be provided.

The paper goes on to highlight the “adaptivity and autonomy” approach which raises the overarching purpose of AI in that it continuously teaches itself to develop and perform new functions, in some cases without the need for human oversight or express control. The UK government correctly identifies that applying this approach to

²¹ Ibid at pp. 113

²² Ibid at pp. 37

²³<https://www.gov.uk/government/publications/software-and-ai-as-a-medical-device-change-programme/software-and-ai-as-a-medical-device-change-programme-roadmap>

the function of AI allows for it to “future proof” its framework by diverging from standard hardline legal definitions that are rigidly protected in law. The framework is described as innately context based, whereby the regulation of the use of AI rather than technology itself allows for a more proportionate approach. This returns to the narrative of empowering existing regulators as the best placed actors in the existing sphere rather than introducing a new central regulator like that proposed in the EU AI Act. This approach, provisionally, seems a more advantageous one for those in the market as it removes the potential confusion and complexity of dealing with a new regulatory body whereby teething problems including but not limited to: procedure, access to information etc - undoubtedly would have been an unavoidable issue.

While there has been slight pushback by some regulators with the lack of statutory footing with this new approach, the UK Government has committed to reevaluating this after the initial period of non-statutory measures and potentially a statutory duty of having “due regard” down the line. Support will be provided to the regulatory bodies that will be engaging businesses over a number of areas including, but not limited to; potential impacts on data protection, integration with existing cybersecurity requirements and providing succinct guidance to manufacturers in their sectors - ensuring a clear mandate that should allow for a lack of interruption to businesses in these areas by undertaking the following:

- Assess the cross-cutting principles and apply them to AI use cases that fall within their remit;
- Issue relevant guidance on how the principles interact with existing legislation to support industry to apply the principles. Such guidance should also explain and illustrate what compliance looks like;
- Support businesses operating within the remits of multiple regulators by collaborating and producing clear and consistent guidance, including joint guidance where appropriate²⁴.

With regard to Generative AI, which features heavily in other jurisdictional frameworks and proposed legislation, the UK government has stated that regulatory sandboxes for

²⁴ Ibid at pp. 63

generative AI models and clarification in relation to Intellectual Property (IP) law²⁵ are to be looked at in relation to this area. Given the rising trend since the initial publication of the paper, there is a possibility that this area might be further expanded on.

The UK Government notes that the development of international and regional AI-specific technical standards addressing a number of topics such as bias, safety, risk management inter alia, already exist and accordingly, can be used to “compliment sector-specific approaches to AI regulation”²⁶. Businesses are asked to note the AI Standards Hub²⁷ whereby the ongoing delivery of AI related technical standards to support businesses can be found. It is noted that regulators may encourage the adoption of sector specific standards as well as broader good practice technical standards to allow for support with compliance down the line.

3.1. What Could Happen Next?

The UK hosted its inaugural “AI Safety Summit”²⁸ on the 1 & 2 November 2023 at Bletchley Park, Buckinghamshire, an apt homage to Alan Turing. While the focus of the summit is on frontier AI, it is hopeful that the outcome will reflect more productive discussions on defining AI safety as it does not currently have a universally agreed definition²⁹. Until then, hopefully the UK remains steadfast in its commitment to easing the burden of the use of AI in business for manufacturers, producers and more.

4. China

August 2023 saw the Chinese Government publish a regulation on the interim measures for the management of generative artificial intelligence services. The legislation, a joint venture across a number of Chinese government ministries and

²⁵<https://www.gov.uk/government/publications/pro-innovation-regulation-of-technologies-review-digital-technologies>

²⁶ Ibid at pp. 111

²⁷ <https://aistandardshub.org/>

²⁸ <https://www.gov.uk/government/publications/ai-safety-summit-introduction>

²⁹ <https://www.gov.uk/government/publications/ai-safety-summit-introduction/ai-safety-summit-introduction-html>

organizations, is far more diluted than its original draft³⁰. The scope of the regulation applies to generative artificial intelligence service providers and technologies that provide the public access to services that generate text, images, audio, video and other content in the country. Excluded from the scope of the regulation however are industrial organizations, enterprises, educational and scientific research institutions, public cultural institutions and other relevant professional institutions that research, develop and apply generative AI technology.

The legislation introduces restrictions for companies providing generative artificial intelligence services to consumers regarding both the training data used and subsequent outputs produced. Service providers are required to provide clear instructions and information to users for the use of generative AI technology and take effective measures to prevent the over-reliance on generative AI services by underage users as well as being required to appropriately handle users' information in accordance with the law. Service providers shall affix markings on AI contents in accordance with the legislation, as well as take responsibility for establishing a reporting mechanism for complaints and facilities for the disposal and rectification of illegal content. In cases of the aforementioned, service providers are obligated to report to the relevant authorities.

On 11 December 2022, the Cyberspace Administration of China, the China Ministry of Industry and Information Technology (MIIT) and the China Ministry of Public Security (MPS) published Regulation No.12 on the provisions on the administration of deep synthesis of internet-based information services³¹. The regulation applies to deep synthesis service providers and users that facilitate or utilize deep synthesis technologies such as deep learning and virtual reality, that use generative sequencing algorithms to create text, images, audio or other information.

On 4 January 2022, the Cybersecurity Administration of China passed the "Internet Information Service Algorithm Recommendation Management Regulations", a sweeping and arguably the most fully developed artificial intelligence regulation in

³⁰http://www.cac.gov.cn/2023-07/13/c_1690898327029107.htm

³¹http://www.cac.gov.cn/2022-12/11/c_1672221949354811.htm

relation to algorithmic use globally. This regulation entered into force on 1 March 2022, furthering the tightening of regulations within China and having a major impact on global players within the e-commerce and technological sector, with the use of algorithms being an integral part of business models these days. These regulations are far reaching and expected to have an impact on businesses who use algorithms for content recommendation, targeted advertising, commerce companies and a variety of service platforms whereby any algorithm-recommended service providers that sell goods or provide services to consumers shall protect consumers' rights to fair transactions and shall not use algorithms to determine transaction prices and other transaction conditions based on characteristics such as consumers' preferences and transaction habits.

4.1. Applicability of the Internet Information Service Algorithm Recommendation Management Regulations

The scope of the legislation applies to companies who use algorithm recommendation services i.e the application of algorithm recommendation technology within the territory of the People's Republic of China. The term "application algorithm recommendation technology" refers to the use of algorithmic technologies such as:

- Generation and synthesis;
- Personalized push;
- Sorting and selection;
- Retrieval and filtering; and
- Scheduling decision-making to provide information to users.

Users of algorithm recommendation services shall abide by laws and regulations, respect social morality and ethics, abide by business ethics and professional ethics, and follow the principles of fairness, openness, transparency, scientific rationality, and good faith, in an attempt to promote the comprehensive governance of internet information service algorithms.

Algorithm recommendation service providers are responsible for the following:

- Algorithm security and security assessment monitoring;
- Establishing and improving algorithm mechanism review;
- Any scientific and technological ethics review;
- User registration and information release review;
- Data security and personal information protection;
- Anti-telecommunication network fraud;
- Security management systems; and
- Technical measures such as emergency response to incidents.

4.2. What is Required of Algorithm Recommendation Service Providers?

The regulations balance the protection of user rights and interests of algorithm recommendation service providers. Article 6 requires that algorithmic recommendation services shall not be used to engage in activities prohibited by laws and administrative regulations i.e. endangering national security and social and public interests, disrupting economic and social order, or infringing on the legitimate rights and interests of others. Furthermore, algorithmic recommendation services shall not be used to disseminate laws and administrative regulations or information and measures should be taken to prevent and resist the dissemination of bad information such as "fake news". Following on from this, per Article 9 of the regulations, any algorithm recommendation service providers must immediately cease the spread of any information not adhering to the regulations, take corrective action and report any discovery of said information to the CAC. This places the responsibility for moderation of content upon the algorithm service providers themselves by requiring them to establish and continuously improve databases for identifying illegal and bad information and improving storage standards, rules and procedures in line with any developments. Relevant record keeping and reporting to the network information department are required in this instance also.

4.3. Protection of User Rights and Data

Providers are required to notify users in a conspicuous manner of their provision of algorithmic recommendation services, and publicize the basic principles, purposes, and main operating mechanisms of algorithmic recommendation services in an appropriate manner. This is to promote ethical behavior and prevent the use of user information being used in a biased or unethical manner. Should a consumer decide to opt out of the algorithm, the provider must immediately stop providing relevant services. Users must also be provided with the function of selecting or deleting user tags for their personal characteristics within the service itself. Providers who use an algorithm that has significant impact on the rights and interests of the user are required to explain it according to the law and assume corresponding responsibilities. The legislation requires that providers must create interfaces where users are allowed to select and remove keywords used for the algorithm used by providers as well as have control over their own data profile. China is currently the only country to enact such a requirement in their artificial intelligence legislation.

4.4. Protection of Labor Rights

In relation to providers whose algorithm affects the following groups:

- Minors;
- The elderly;
- Workers; and
- Consumers and other subjects.

Algorithms must not incite addiction to the internet and there is a ban on pushing information that may promote or incite unsafe behaviors, violate social morality, induce minors' bad habits, etc. The legislation places stipulations on algorithm-recommended service providers who provide services to the elderly requiring them to protect the rights and interests enjoyed by the elderly in accordance with the law, fully consider the needs of the elderly for travel, medical treatment, consumption, and errands, and provide intelligent elderly-appropriate services in accordance with relevant state regulations. The law specifically regulates scenarios where algorithm recommendation service providers provide workers with job scheduling services. They are required to

ensure the protection of workers' rights and interests such as labor remuneration, rest and vacation, remuneration composition and payment, working hours, rewards and punishments inter alia while also highlighting the prohibition of providers using algorithms to implement unreasonable transaction conditions such as transaction prices based on consumer preferences etc.

4.5. Are Providers Outside of China Affected?

Yes, any provider that operates an app or online service that uses algorithms for any of the above-mentioned purposes are required to adhere to the regulations. Algorithm-recommended service providers are required to keep network logs and set up convenient and effective portals for user complaints, reports, information on clarification of processing procedures and so forth. Similarly, any algorithm recommendation service providers with public opinion attributes or social mobilization capabilities shall fill in the name, service form and application of the service provider through the Internet Information Service Algorithm Filing System within ten working days from the date of providing the service. This is available on the CAC's website. The legislation entered into force on 1 March 2022.

5. Conclusion

What Should Businesses Do in Preparation for Finalization?

It is clear that a pattern of divergence exists between jurisdictions and their approach to finalizing AI frameworks globally - this means that businesses will need to ensure that they are prepared in an attempt to ease any potential compliance burden they may face down the line.

It is recommended that businesses do the following:



- Establish an AI Governance system if you are engaging in AI within your business or product portfolio. Ensure you have an AI register and that individuals in your organization who use AI are equipped to use it correctly;
- Ensure you are aware of the level of risk your AI is operating by conducting risk assessments and use these to implement proactive standard operating procedures within your business as well as policies to prevent ethical bias, discrimination and risk while promoting transparency; and
- Keep up to date with legislative developments in the area of artificial intelligence. As discussed in this paper, they are quickly introduced and tend to diverge over jurisdictions which means a higher compliance burden that is important to keep on top of.